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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;
MARK ZUCKERBERG, an individual;
CHRISTOPHER COX, an individual;
JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

Defendants.

Case No. CIV 533328

**Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23**

**DEFENDANT FACEBOOK, INC.'S
OPPOSITION TO BIRNBAUM & GODKIN,
LLP'S MARCH 15, 2019 MOTION TO SEAL**

Date: July 19, 2019
Time: 2:00 p.m.
Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015

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1 **I. INTRODUCTION**

2 Facebook opposes Birnbaum & Godkin’s (“B&G”) March 15 sealing motion for the simple
3 reason that it seeks to place under seal information that is already public. Indeed, the information the
4 motion seeks to seal has been publicly disclosed by either B&G, an expert it retained, or Thomas
5 Scaramellino.

6 In response to the Court’s Case Management Order No. 19, Six4Three’s lead counsel served a
7 declaration on March 5, attaching “fully executed [Protective Order] Certifications of all consultants or
8 expert witnesses” (the “March 5 Declaration”). While the declaration itself was not marked confidential,
9 the Protective Order Certifications attached as exhibits bore a “CONFIDENTIAL” label. Out of an
10 abundance of caution, Facebook lodged both the declaration and exhibits under seal as Exhibit 1 to its
11 reply to Facebook’s motion to reopen discovery, filed on March 6, 2019.

12 B&G’s March 15 sealing motion asks the Court to seal paragraphs 3 through 11 of Mr. Godkin’s
13 March 5 Declaration (which was not marked confidential), because these paragraphs “discuss its methods
14 for storing litigation documents and discloses the identity of non-testifying consultants and experts whose
15 identify is not required to be disclosed to Facebook pursuant to the Stipulated Protective Order in this
16 case.”

17 The problem with this request is that **all** of the information that B&G seeks to seal has been made
18 public.

19 ***First***, B&G notably only moved to seal specific paragraph of Mr. Godkin’s March 5 Declaration.
20 It did not move to seal the Protective Order Certification exhibits, which plainly disclose identifying
21 information for the very same Six4Three experts and consultants that B&G seeks to keep secret in Mr.
22 Godkin’s March 5 Declaration.

23 ***Second***, just three days after filing this motion to seal, B&G publicly filed a version of the March
24 5 Declaration that redacted only a small portion of the information it seeks to seal with this motion (the
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1 “March 18 Redacted Declaration”).¹ Decl. of Zachary G.F Abrahamson in Opp. to B&G.’s March 15
2 Mot. to Seal submitted herewith (“Abrahamson Decl.”) Ex. 1, March 18 Redacted Decl. The March 18
3 Redacted Declaration made public all of paragraph 3 through 11, with the limited exceptions of (1) the
4 name of B&G’s “password protected document hosting platform” from paragraph 3, (2) the names of the
5 three consultants that Six4Three retained in paragraphs 7–10, and Exhibits A–E, and Exhibit F in its
6 entirety. Thus, all of the material that was publicly filed in unredacted form in the March 18 Redacted
7 Declaration should not be sealed.

8 **Third**, with regard to B&G’s “password protected document hosting platform,” B&G made the
9 name of this platform public later in the March 18 Redacted Declaration, at paragraph 7. It cannot be
10 maintained under seal.

11 **Finally**, the identities of two of Six4Three’s three consultants have been publicly disclosed in
12 other filings and in open court.

13 B&G’s March 15 sealing motion should therefore be denied.

14 **II. ARGUMENT**

15 **A. B&G’s March 15 Sealing Motion Does Not Seek to Seal the Exhibits to Mr. Godkin’s** 16 **Declaration.**

17 B&G’s March 15 sealing motion is clear in the specific information it seeks to seal:

18 Paragraphs 3 through 11 (p. 2, line 10 through p. 5, line 14) of Exhibit 1 to
19 the Declaration of Zachary G.F. Abrahamson in Support of Reply to
Defendant Facebook, Inc.’s Motion to Open Discovery and to Compel

20 Mem. of P. & A. Supp. Motion to Seal at 2:4–6. B&G has not sought to seal the any other material that
21 Facebook lodged under seal with its reply to Facebook’s motion to open discovery and compel, filed on
22 March 6, and the deadline to file a sealing motion has long since passed. All information contained
23 outside of paragraphs 3 through 11 of Mr. Godkin’s March 5 Declaration (Exhibit 1 to Mr.
24

25 ¹ In Case Management Order No. 20, the Court ordered that “[a]ll declarations, supplemental
26 declarations, and submissions in response to Amended Case Management Order no. 19 that have been
27 previously served by email on the Court and all other parties shall be filed and served no later than
28 Monday, March 18, 2019 at 12:00 p.m.” Pursuant to this Order, B&G publicly filed a redacted version
of the March 5 Declaration: the March 18 Redacted Declaration. With that filing, Six4Three filed a
second motion to seal, which Facebook separately opposes on the basis that virtually all of the
information sought to be sealed is already public.

1 Abrahamson’s March 6 Declaration), including Exhibits A through F, should enter the public record.
2 This includes the names of Six4Three’s three retained experts and consultants.

3 **B. B&G Publicly Filed Almost All the Information That B&G’s Motion Seeks to Seal**
4 **Three Days After B&G Filed This Motion.**

5 On March 18, 2019, B&G publicly filed a redacted version of the March 5, 2019 Godkin
6 Declaration. The March 18 Redacted Declaration left unredacted virtually all of paragraphs 3 through
7 11—the very paragraphs that B&G’s March 15 motion sought to seal. *See* Abrahamson Decl. Ex. 1,
8 March 18 Redacted Decl. ¶¶ 3–11. So at minimum, the Court must deny B&G’s sealing motion as to
9 information that B&G published on March 18, 2019. *See id.*

10 Even the information that B&G kept redacted on March 18 deserves to be unsealed. The *only*
11 text that filing purported to keep secret were the names of B&G’s document hosting platform and the
12 names of various “experts” that Six4Three retained. But the filing even put some of *that* information
13 into the public domain: For example, paragraph 7 of the March 18 Redacted Declaration notes that
14 “[Redacted] was granted access to *the Relativity document hosting platform.*” Abrahamson Decl. Ex. 1,
15 March 18 Redacted Decl. at 3:14–15 (emphasis added). And Paragraph 10 of Mr. Godkin’s March 18
16 Redacted Declaration specifically identifies one of Six4Three’s retained experts by name: “I am not able
17 to comply with ¶3 of Case Management Order No. 19 directing Six4Three to serve a verified declaration
18 *of* [named Six4Three consultant] despite good faith efforts to do so, *as follows.*” *Id.* at 4:17–19
19 (emphases added).

20 **C. Other Public Documents Reveal the Information that B&G’s March 15 Motion**
21 **Seeks to Seal.**

22 Even if B&G’s March 18 Redacted Declaration had not publicized the information that B&G now
23 seeks to seal, other public filings have. For example, Mr. Godkin, on February 28, publicly filed the
24 following statements in a declaration opposing a Facebook *ex parte* application: “My firm retained two
25 expert consultants to assist us with this litigation. *One was [named Six4Three consultant], who is a*
26 *well-known expert in digital privacy issues[.]*” Abrahamson Decl. Ex. 2, Decl. of David S. Godkin in
27 Supp. of Resp. to Def.’s *Ex Parte* Appl. for Order Enforcing the Stipulated Protective Order ¶ 2 (Feb. 28,
28 2019) (emphasis added). The declaration went on to describe Six4Three’s consultant’s execution of the

1 protective order and Mr. Godkin’s communications with him. *Id.* ¶¶ 2–3. Days later, the Court named
2 Six4Three’s consultant as one of Six4Three’s experts. *See* Abrahamson Decl. Ex. 3, CMO No. 19 ¶ 2
3 (“[Six4Three] shall produce fully executed Certifications of all consultants or expert witnesses . . .
4 including but not limited to . . . **[Six4Three’s named consultant]**.”) (emphasis added).

5 Six4Three’s consultant was publicly identified again on March 13, 2019, during the hearing on
6 Six4Three’s lawyers’ motions to be relieved as counsel, along with another of Six4Three’s three retained
7 consultants. *See* Abrahamson Decl. Ex. 4, Hr’g Tr. 18:17–21 (Mar. 13, 2019) (“[Facebook’s counsel]:
8 Your Honor asked for but did not receive declarations from the quote-unquote ‘experts.’ [Six4Three’s
9 named consultant] in particular has not provided that declaration.”). That time, another of Six4Three’s
10 consultants was expressly named. *Id.* 19:2–6 (“[Facebook’s counsel]: For [both of Six4Three’s named
11 consultants], we do believe that counsel should provide the declarations or the Court should order those
12 experts who signed the declarations . . . to provide them.”).

13 Later, Thomas Scaramellino—Six4Three’s lone investor and B&G’s law clerk until December
14 2018—filed a declaration on March 14, 2019 revealing much of the information that this motion seeks to
15 seal. *See generally* Abrahamson Decl. Ex. 5, Decl. of Thomas Scaramellino in Compliance with Am.
16 Case Mgmt. Order No. 19 (Mar. 14, 2019). In particular, Mr. Scaramellino’s declaration publicized (1)
17 the sequence of events related to Mr. Scaramellino’s execution of the Stipulated Protective Order, *see id.*
18 ¶ 2; and (2) the circumstances surrounding Scaramellino’s retention of [one of Six4Three’s named
19 consultants], in addition to [the consultant’s] address and contact information, *see id.* ¶¶ 5–6 & Ex. 3.
20 Six4Three’s consultants’ role in this case has been public for months. B&G cannot credibly claim that
21 harm will result unless the “identity of Plaintiff’s non-testifying experts” remains sealed.

22 **III. CONCLUSION**

23 For the foregoing reasons, B&G’s March 15, 2019 motion to seal should be DENIED.
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1 Dated: July 8, 2019

DURIE TANGRI LLP

2
3 By: _____



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PROOF OF SERVICE

I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On July 8, 2019, I served the following documents in the manner described below:

DEFENDANT FACEBOOK, INC.'S OPPOSITION TO BIRNBAUM & GODKIN, LLP'S MARCH 15, 2019 MOTION TO SEAL

☒ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by Federal Express for overnight delivery.

☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from cortega@durietangri.com to the email addresses set forth below.

On the following part(ies) in this action:

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10 I declare under penalty of perjury under the laws of the United States of America that the
11 foregoing is true and correct. Executed on July 8, 2019, at San Francisco, California.
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Christina Ortega